

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs December 5, 2014

IN RE DESTINY W.

**Appeal from the Juvenile Court for Wilson County
No. 14777 Charles B. Tatum, Judge**

No. M2014-01256-COA-R3-PT – Filed April 30, 2015

This appeal involves the termination of Mother’s parental rights to her child. At ten and one-half weeks old, the Department of Children’s Services placed the child with guardians due to Mother’s drug use. About eighteen months after the child’s placement with the guardians, the Guardian ad Litem filed a petition for termination of parental rights. The juvenile court found statutory grounds for termination of Mother’s parental rights and that termination was in the child’s best interest. On appeal, Mother argues that the Guardian ad Litem did not have standing to file the petition to terminate parental rights and that clear and convincing evidence did not support the juvenile court’s conclusion that termination of Mother’s parental rights is in the child’s best interest. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Affirmed

W. NEAL MCBRAYER, J., delivered the opinion of the Court, in which FRANK G. CLEMENT, JR., P.J., M.S., and ANDY D. BENNETT, J., joined.

W. Michael Kilgore, Nashville, Tennessee (on appeal), Karen Parker Casey, Lebanon, Tennessee (at trial), for the appellant, Erica W.

Elizabeth L. Youmans, Lebanon, Tennessee, Guardian ad Litem.

OPINION

I. FACTUAL AND PROCEDURAL BACKGROUND

On May 31, 2012, a Child Protective Services Investigator (the “Investigator”) with the Department of Children’s Services in Wilson County, received a referral regarding Destiny W. The Investigator found Erica W. (“Mother”), Mother’s friend, and Destiny W. at a hotel.¹ The investigator had to knock several times before the door was answered by Mother’s friend. Once the door was opened, the Investigator asked to speak with Mother, who was sleeping in a bed with Destiny.

The Investigator, with some difficulty, roused Mother. The Investigator explained that there had been a complaint that Mother and her friend were under the influence of intoxicants, and they would need to submit to drug screens. The Investigator recalled that both Mother and her friend were sluggish, slurring their words, and “glossy-eyed.” Mother ultimately tested positive for benzodiazepines and opiates. Mother stated that she had a prescription for some medication, but she did not have the bottles with her, claiming she had been kicked out of her home.

Following the positive drug screen, the Investigator determined that a “safety placement” was needed for the child. The Investigator began exploring individuals named by Mother as possible caretakers for Destiny, who was ten and one-half weeks old at the time. On June 8, 2012, DCS filed a petition to transfer temporary legal custody to family friends.

The trial court entered a protective custody order on June 11, 2012. In this order, the juvenile court found probable cause to believe that Destiny was dependent and neglected. The order included the following list of tasks for Mother to complete:

7. [Mother] shall provide a safe, stable and drug-free home for her children.
8. [Mother] shall complete an Alcohol and Drug Assessment and shall comply with all recommendations. Mother shall attend one appointment per week and shall provide the Department with proof of her attendance.
9. [Mother] shall submit to random drug screens and remain negative for all substances other than those legally prescribed to her.

¹ Mother also has a son who is not a subject of this appeal.

10. [Mother] shall obtain a Parenting Assessment and shall follow the recommendations of that assessment.

11. [Mother] shall be provided with supervised visitation and contact of her children that shall be supervised by [guardians] . . . and/or their adult designees.

The Investigator remained involved in the case after Destiny was placed in temporary custody. As part of her duties, she administered Mother's drug screens, as required by the trial court. The Investigator stated that all of Mother's drug screens were positive for drugs. Mother only provided her prescriptions once. In addition, Mother did not avail herself of the various services provided by DCS to accomplish the tasks listed by the trial court.

On October 1, 2012, the juvenile court entered an Adjudicatory Hearing Order. The juvenile court concluded that Destiny was dependent and neglected due to Mother's drug use. Further, the court ordered the child to remain in the legal and physical custody of the guardians. Mother was granted supervised visitation. The juvenile court stated the following in its order:

This case is closed. In order to reopen the matter to modify the Court's final visitation, custody or other orders, Mother must petition the Court to reopen and provide proper notice to the Department of Children's Services. Mother must provide evidence to the Department and to the Court she has complied with all services requested by the Department in the petition, which is incorporated here by reference, and with all other Dispositional orders of this Court. All attorneys appointed on this matter are hereby relieved of further responsibility.

On November 18, 2013, the juvenile court heard the Guardian ad Litem's motion for emergency suspension of Mother's visitation and subsequently granted the motion. Also on November 18, 2013, the Guardian ad Litem filed a Petition for Termination of Parental Rights.² As grounds for termination, the Guardian ad Litem alleged abandonment of Destiny by willfully failing to visit and failing to support or make payments towards support, as well as, persistent conditions. The juvenile court held a hearing on March 26, 2014.

According to the Investigator, she had no trouble with the guardians, Mr. and Mrs. L., while they had custody of Destiny. The Investigator said that Mrs. L. was very

² Father was also named in the petition for termination of parental rights. He is not a party to this appeal.

much “on top of things.” Friction did exist between Mother and Mr. and Mrs. L., which the Investigator attributed to “different parenting styles” and “personalities.” One area of conflict was the individuals who accompanied Mother for visitations. Mrs. L. expressed concern that, on one of the visits, Mother’s acquaintances were intoxicated.

Mr. L. testified about the roughly two years Destiny had been in his and his wife’s custody. Mr. and Mrs. L.’s initial intent was to keep Destiny temporarily until Mother got her life back on track. They considered adoption when it became apparent that Mother was not completing any of the steps to get back on track. Mr. L. attended about three of the visitations. After the visitations, Destiny would be very clingy. Mother did not make regular monetary payments or regularly bring diapers or other necessities. Between the time Mr. and Mrs. L. took the emergency placement and the filing of the petition, Mother left three messages with Mr. L., two voicemails and a text message. Mr. and Mrs. L. could not return the voicemail messages because Mother had called from restricted numbers both times.

Mrs. L. testified that, while she had custody of Destiny, Mother brought \$8.00, four or five packages of diapers, and about seven outfits. Mother did not give Destiny a Christmas present either year while she was in Mr. and Mrs. L.’s custody. Mrs. L. said that the visits between Mother and Destiny were confusing for Destiny. During the visits, Mother focused on telling Destiny that she was her mother and Mrs. L. was not. Destiny would cry and was very clingy with Mrs. L. Mrs. L. echoed what Mr. L. said, that their original intention was to keep Destiny until Mother could get her life back on track. However, it became apparent that Mother was not going to be able to get back on track.

During her testimony, Mother admitted she was addicted to benzodiazepines. She stated that she abused prescription drugs. However, she also admitted to testing positive for cocaine. Although she could not recall the date of the positive test for cocaine, later testimony established that she tested positive in the month prior to the filing of the petition to terminate parental rights.

At the time of the hearing, Mother was on probation for being a habitual traffic offender. She also disclosed serving a seventy-five day jail term after Destiny was removed from her custody. Mother lived in several different places after her release from jail. Since the filing of the petition to terminate parental rights, she had been living in a one-bedroom apartment above a garage, but she had no written lease agreement with the property owner.

Mother did not finish high school, and she had not held a full time job since 2008. She supported herself by cleaning house for another individual and watching the niece

and nephews of a friend. She also received food stamps. She was in the process of making a claim for disability due to a hip injury.

Mother admitted that she did not pay regular child support. She maintained that she gave Mrs. L. \$20.00 here and there to buy Destiny diapers, wipes, or whatever she needed. She said she brought something every week to visitation. It might have been clothes or toys instead of money. Mother said that she loves Destiny and wants to raise her because she is her mother.

At the conclusion of the hearing, the juvenile court determined that two grounds existed to support the termination of parental rights: (1) Mother had abandoned Destiny and (2) conditions persisted that would lead to a reasonable probability that Destiny would be subjected to further abuse or neglect. The juvenile court also stated the following regarding the best interest of Destiny:

Now, with best interest issue, that's a little different. I've got a young lady who's got a brother and she's got a momma. We'll get into that issue about the natural life and death issue. You know, I've got this testimony about how she gets clingy after her visit. I don't place too much on that. . . . You don't know what's going through a child's mind or why they act like they do, but what I do know is that this little girl came into [Mr. and Mrs. L.'s] home at ten-and-a-half weeks and she is -- I got to do math now. Fifty-two plus fifty-two is a hundred and four, plus two weeks. So, she's a hundred-and-six-weeks-old. Two years and two weeks, and she's been in the same home, hearing the same voices and the same sounds, and the same smells for ninety-six of those weeks. She's got children that she perceives as being older siblings that she's got a relationship with and she's got folks that, you know, when she's got the sniffles or she's got a wet diaper, or she needs a bath or it's bed-time and she wants a story read, that's who she goes to. You can't -- she's not old enough to compare school grades or test scores, or even how clean she is or dirty she is. And your testimony was, the first day we were here, is that you're her mother and she needs her mother, and she does. She needs a mom, and I'm not condemning you to say that you couldn't be a good mother, but I think we're past that point. So, I am going to make the decision that, because of the relationship that's been established with Mr. and Mrs. L. and the duration of time that's been allowed to pass by [Mother], that the best interest would determine that her termination of parental rights be set.

On April 17, 2014, the juvenile court entered an order terminating Mother's parental rights to Destiny.

II. ANALYSIS

Mother raised two issues on appeal. First, she argues that the Guardian ad Litem lacked standing to file the petition to terminate Mother's parental rights. Second, while not contesting the grounds for termination, Mother argues that the trial court erred when it determined that clear and convincing evidence supported the finding that termination of Mother's parental rights was in the child's best interest.

A. STANDING TO FILE PETITION

Under Tennessee Code Annotated § 36-1-113(b), the following individuals or entities have standing to file a petition to terminate parental rights: “[t]he prospective adoptive parent or parents, including extended family members caring for a related child, any licensed child-placing agency having custody of the child, the child's guardian ad litem, or [DCS].” Tenn. Code Ann. § 36-1-113(b) (Supp. 2013). Although acknowledging that the Guardian ad Litem was appointed by the court in the dependency and neglect proceeding, Mother argues the Guardian ad Litem ceased serving in that capacity by operation of Supreme Court Rule 40A³ when the juvenile court entered the order on the Adjudicatory Hearing on October 1, 2012, and stated that the case was closed.

We find Supreme Court Rule 40A inapplicable to the Guardian ad Litem's original appointment. Rule 40A is applicable “to all guardian ad litem appointments in custody proceedings.” Tenn. Sup. Ct. R. 40A, § 2. The rule defines a “custody proceeding” as “a court proceeding, other than an abuse or neglect proceeding, in which legal or physical custody of, access to, or visitation or parenting time with a child is at issue” *Id.* § 1(a). The term “abuse or neglect proceedings” is defined as, “a court proceeding for protection of a child from abuse or neglect or a court proceeding in which termination of parental rights is at issue.” *Id.* § 1(b).

Although the petition filed by DCS that resulted in the Guardian ad Litem's appointment was styled a “Petition to Transfer Temporary Legal Custody and for Ex Parte Order,” the petition initiated an abuse and neglect proceeding as defined by the rule. DCS filed the petition in juvenile court and requested a finding of dependency and neglect. The petition also sought the appointment of a guardian ad litem with compensation as provided for in Tennessee Code Annotated § 37-1-150 (Supp. 2013). After finding that Destiny was dependent and neglected, the juvenile court ordered only

³ Under Supreme Court Rule 40(A), if no order specifies the duration of the appointment, the appointment of a guardian ad litem “shall terminate automatically when the trial court order or judgment disposing of the custody or modification proceeding becomes final.” Tenn. Sup. Ct. R. 40A, § 5.

temporary custody subject to Mother meeting certain conditions necessary for the child's safe return.

As an abuse and neglect proceeding in juvenile court, Supreme Court Rule 40 applies to the Guardian ad Litem's original appointment. Under Rule 40, "[t]he obligation of the guardian ad litem to the child is a continuing one and does not cease until the guardian ad litem is *formally relieved by court order.*" Tenn. Sup. Ct. R. 40(c)(3) (emphasis added). Here, the Adjudicatory Hearing Order entered on October 1, 2012, by the juvenile court, in addition to closing the case, provided that "[a]ll attorneys appointed on this matter are hereby relieved of further responsibility."

In this circumstance, the Adjudicatory Hearing Order notwithstanding, we conclude the Guardian ad Litem did have standing to petition for termination of parental rights. After the filing of the petition to terminate parental rights, on January 23, 2014, the juvenile court appointed the Guardian ad Litem nunc pro tunc to March 6, 2013. Although Mother claims the nunc pro tunc order "is contradictory to [Tennessee Code Annotated § 36-1-113(b)] and severely prejudices" her, she does not challenge the basis for entry of the order nunc pro tunc. She also does not include in the record the transcript from the hearing on her motion to dismiss for lack of standing, which effectively precludes us from considering the issue.⁴ See *In re Adoption of E.N.R.*, 42 S.W.3d 26, 30 (Tenn. 2001).

B. BEST INTEREST OF THE CHILD

On appeal, Mother does not argue that the juvenile court erred in finding statutory grounds for termination. This Court has previously stated that a party's failure to argue an issue in their brief constitutes a waiver of the issue. *Forbess v. Forbess*, 370 S.W.3d 347, 355 (Tenn. Ct. App. 2011). Because Mother did not present an argument that the juvenile court erred in finding statutory grounds for termination of her parental rights, any such issue is waived. Therefore, we address only the issue raised on appeal, whether the termination of Mother's parental rights is in Destiny's best interest.

Our Legislature has identified those situations in which the State's interest in the welfare of a child justifies interference with a parent's constitutional rights by setting forth the grounds upon which termination proceedings may be brought. Tenn. Code Ann. § 36-1-113(g). Termination proceedings are statutory, *In re Angela E.*, 303 S.W.3d at 250; *Osborn v. Marr*, 127 S.W.3d 737, 739 (Tenn. 2004), and parental rights may be terminated only where a statutorily defined ground exists. Tenn. Code Ann. § 36-1-

⁴ The record also does not include an order on the motion to dismiss. Mother states the motion was denied by the juvenile court at a hearing held on January 15, 2014.

113(c)(1); *Jones v. Garrett*, 92 S.W.3d 835, 838 (Tenn. 2002); *In re M.W.A., Jr.*, 980 S.W.2d 620, 622 (Tenn. Ct. App. 1998).

To terminate parental rights, a court must determine by clear and convincing evidence the existence of at least one of the statutory grounds for termination and that termination is in the best interest of the child. Tenn. Code Ann. § 36-1-113(c); *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002). This heightened burden of proof is one of the safeguards required by the fundamental rights involved, *see Santosky v. Kramer*, 455 U.S. 745, 769 (1982), and its purpose “is to minimize the possibility of erroneous decisions that result in an unwarranted termination of or interference with these rights.” *In re Bernard T.*, 319 S.W.3d 586, 596 (Tenn. 2010); *see also In re Angela E.*, 303 S.W.3d at 250; *In re M.W.A.*, 980 S.W.2d at 622. “Clear and convincing evidence enables the fact-finder to form a firm belief or conviction regarding the truth of the facts, and eliminates any serious or substantial doubt about the correctness of these factual findings.” *In re Bernard T.*, 319 S.W.3d at 596 (citations omitted). Unlike the preponderance of the evidence standard, “[e]vidence satisfying the clear and convincing evidence standard establishes that the truth of the facts asserted is highly probable.” *In re Audrey S.*, 182 S.W.3d 838, 861 (Tenn. Ct. App. 2005).

Appellate courts review the trial court’s findings of fact in termination proceedings de novo on the record and accord these findings a presumption of correctness unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d); *In re Bernard T.*, 319 S.W.3d at 596; *In re Angela E.*, 303 S.W.3d at 246. “In light of the heightened burden of proof in [termination] proceedings . . . the reviewing court must then make its own determination regarding whether the facts, either as found by the trial court or as supported by a preponderance of the evidence, provide clear and convincing evidence that supports all the elements of the termination claim.” *In re Bernard T.*, 319 S.W.3d at 596-97.

The Legislature has instructed courts to consider a non-exclusive list of factors in making a best interest determination. Tenn. Code Ann. § 36-1-113(i). In conducting a best interest analysis, the focus is on what is best for the child, not what is best for the parent. *In re Marr*, 194 S.W.3d 490, 499 (Tenn. Ct. App. 2005); *White v. Moody*, 171 S.W.3d 187, 194 (Tenn. Ct. App. 2004). We do not need to find that every factor applies in order to determine that the termination of parental rights is in the child’s best interest. *In re M.A.R.*, 183 S.W.3d 652, 667 (Tenn. Ct. App. 2005).

In its written order, the juvenile court made the following findings with respect to the child’s best interest:

7. The Court finds by clear and convincing evidence that termination of the parental rights of [Mother] is in the best interests of the child for the following reasons:

. . . .

(b) The child was removed from the mother's custody when she was only ten and one half weeks old. The child now is over 108 weeks old, having resided continuously with [Mr. and Mrs. L.] the entire time that she has been removed from the mother's custody, and having seen the mother only during the weekly, one-hour supervised visitation periods. . . .

(c) For the overwhelming majority of the child's life, the child has been immersed in [Mr. and Mrs. L.'s] home, among its sounds, smells, children and relationships.

(d) Consequently, the child has bonded with [Mr. and Mrs. L.].

(e) Undoubtedly, the child has no substantial bond with [Mother].

(f) Termination of the parental rights of [Mother] will enable the child to be placed into a safe, stable, loving, and permanent home, thereby granting to her a degree of permanency to which she is entitled and which has largely been lacking in her life.

In the case at hand, we find that the evidence does not preponderate against the trial court's factual findings. We also conclude that termination of Mother's parental rights was shown to be in the child's best interest by clear and convincing evidence. The trial court based its best interest determination primarily on the child's lack of a bond and meaningful relationship with Mother. *See* Tenn. Code Ann. § 36-1-113(i)(4). In her brief, Mother argues that several of the statutory best interest factors do not apply to her situation. However, as stated above, we do not need to find that every statutory factor applies in order to determine that the termination of a parent's parental rights is in the child's best interest. *In re M.A.R.*, 183, S.W.3d at 667.

With regard to factor (i)(4), whether Mother has established a meaningful relationship with Destiny, Mother states that she "visited with the Child regularly under the court order." The evidence at trial did show that Mother attended the majority of her one hour, weekly visits with Destiny. However, the testimony also showed that Mother failed to take the necessary steps that would have permitted her to increase her visitation time.

At the time of the safety placement, Destiny was ten and one-half weeks old. At the time of the trial, she had been in Mr. and Mrs. L.'s custody nearly two years. In other words, Destiny has spent all but ten and one-half weeks of her life in the custody of the temporary guardians.

The juvenile court also expressed concern about whether Mother had remedied the conditions that necessitated the removal of the child. *See* Tenn. Code Ann. § 36-1-113(i)(1). As noted by the court, during the lengthy period of time the child was in the custody of Mr. and Mrs. L., Mother had “demonstrated little inclination or ability to remedy” the conditions that led to the removal of her child. Although she had been attending Narcotics Anonymous meetings, Mother tested positive for cocaine the month before the petition to terminate was filed, and a substance abuse assessment completed in January 2014 revealed that Mother had “individuals in her life that were not positive influences and were still currently using.”

III. CONCLUSION

For these reasons, we conclude that the Guardian ad Litem had standing to seek termination of Mother's parental rights and clear and convincing evidence supports the trial court's finding that termination of Mother's parental rights is in the best interest of the child. The Juvenile Court's judgment terminating Mother's parental rights to Destiny W. is affirmed.

W. NEAL McBRAYER, JUDGE